ALIAS BIN ABDUL RASHID

v.

ZULKIFLI BIN MOHAMAD & ANOR.

HIGH COURT, JOHOR BAHRU
TUAN RICHARD TALALLA J.
[CIVIL SUIT NO. 964 OF 1985]
12 DECEMBER 1991

TORT: Negligence - Motor vehicle accident - Liability - Vehicles travelling in opposite direction - Motor cyclist riding on the centre white line - Motorcar one foot from centre line - Motorcar swerved right to avoid collision.

The plaintiff was riding motorcycle JAV 3464 along Jalan Batu Pahat/Air Hitam towards Air Hitam. The 1st defendant was driving motor car WG 424 in the opposite direction. The plaintiff was 20 to 40 feet away from the motor car when he crossed over to the 1st defendant's lane. The 1st defendant swerved to his right thinking he was able to avoid the collision but he was not successful. The front left hand side of the motor car came into contact with the motorcycle.

Held:

[1] The plaintiff and the defendant were not proceeding in a safe manner. The plaintiff was riding his motorcycle on the centre white line and the defendant was driving his motorcar only one foot from the line on his side of the road. Thus both the plaintiff and the defendant had placed themselves in a position of potential danger allowing a width of only one foot when crossing each other.

[2] It is more probable that the defendant was driving the motorcar in the middle of the road astride the dividing line refusing or neglecting to give way and expecting the motorcycle to do so and that the plaintiff on his part was of the same mind and bore the same attitude, expecting the defendant to move over - until the danger built up and they were 30 or 40 feet apart. Faced with their self created emergency the plaintiff decided to swerve to the right and in the event the left front of the car collided into the left rear of the motorcycle and then the defendant went over to the other side of the road.

[The plaintiff and the defendant equally liable in negligence for the accident].

Cases referred to:

Laurie v. Raglan [1942] 1 KB 152 at 154 ***(cit)***

Simirah v. Chua Hock Lee & Anor. [1963] 29 MLJ 239 ***(cit)***

Goh Beng Seng v. Dol Bin Dolah [1970] 2 MLJ 95, p. 97 ***(foll)***

Kasirin bin Kasmani v. The Official Administrator & Anor. [1991] 3 CLJ 2498 ***(foll)***

Other sources referred to:

Bingham's Motors claims cases, 9th edition, p. 121

Highway Code, r. 13

For the plaintiff - M/s. L.Fernandez & Co.

For the defendant - Varughese, Kumar, Netto & Partners

[Ed. Note: This judgment was only received by us recently.**]**

JUDGMENT

Richard Talalla J:

The plaintiff pleaded that on 5 July 1984 at about 9.00 p.m. the plaintiff was lawfully riding motorcycle JAV 3464 together with a pillion rider along Jalan Batu Pahat/Air Hitam in the State of Johor towards Air Hitam, when at or near the $13^{1}/_{4}$ milestone of the said road he was knocked down from the rear, by motorcar WQ 424 driven by the first defendant (the defendant). The plaintiff claimed that the collision was caused solely by the negligence of the defendant, pleading by way of particulars of negligence that the defendant was following too close to the rear of the said motorcycle and driving too close to the edge of the said road.

The defendant by way of pleaded defence admitted the collision but denied that he was negligent, claiming on the other hand that it was the plaintiff who was solely or contributorily liable for the collision and alleging that the plaintiff suddenly crossed into the lawful path of the defendant.

The action proceeded to trial. At the trial an agreed bundle of documents was produced and exhibited. The documents included the following:

1. Plaintiff's police report.
2. First defendant's police report.
3. Police Sketch plan and key.
4. Five police photographs.

The plaintiff testified to the pleaded facts and added that when he arrived at $13\ ^{1}/_{4}$ milestone suddenly a car coming from behind knocked against him after which he became unconscious and that he regained consciousness only

the next day at the District Hospital, Batu Pahat. However in cross-examination he said that he did not ascertain as to which direction the car was travelling and that all he could say was that the car knocked against him from the rear. In his police report which was made 2 days after the accident he said that when he reached $13^1/_4$ milestone he did not know what happened to him and that he only regained consciousness the next day but he did say in that report that he was coming from Slim River wanting to return to Kulai. Reverting to his evidence, at first the plaintiff said he did not lodge a police report but when confronted with the report in the agreed bundle of documents he admitted making it but claimed that at the time of making the report he had lost his memory and did not know what was happening. Yet, he testified to remembering that before the collision he was travelling on his side of the road and that there was no vehicle ahead of him but there was a car coming from the opposite direction. I could find nothing in the plaintiff's testimony pointing to negligence on the part of the first defendant. If from his evidence it was sought to deduce that the motorcycle was hit by a vehicle travelling in the same direction I reject such a deduction.

The pillion rider gave evidence on behalf of the plaintiff. He said that a car came and knocked them from the rear. He claimed that immediately upon impact he turned round and saw the car and he even managed to identify its make, so he testified, but that after that he fell and lost consciousness. He said that he was injured and had engaged a lawyer to claim damages for him. He testified that prior to the accident the motorcycle was travelling about 2 to 3 feet away from the left edge of the road and that the plaintiff did not turn to the right immediately before the accident. I found the pillion rider to be a partisan witness, being obviously connected to the plaintiff and himself a claimant in the cause for damages. I reject as far fetched his story of looking back and observing the car and if he was suggesting that the car that ran into them was travelling in the same direction I dismiss the suggestion. I also reject his evidence that the motorcycle was travelling 2 to 3 feet from the left edge of the road if by that he was implying the edge was to the left of the ongoing motorcycle, because broken glass was found on the other side of the road and I shall elaborate on this subsequently. Likewise I do not accept that the plaintiff did not swerve to the right just before impact.

At the end of the plaintiff's case the defendant did not submit no case to answer within the principle laid down in *Laurie v. Raglan* [1942] 1 KB 152 at 154, and followed in *Simirah v. Chua Hock Lee & Anor.* [1963] 29 MLJ 239 or at all. Instead the defendant gave evidence and called witnesses to testify on his behalf. Thus in deciding this case I examined the evidence as a whole.

The defendant testified that at the time of the accident he was returning with his wife and child from Johor Bahru to Melaka in his car, a Honda Civic, and that when he reached $13^1/_4$ milestone it was drizzling but visibility was clear, that there were no vehicles travelling in front of him, that prior to collision the plaintiff's motorcycle was travelling in the opposite direction, that is to say from Batu Pahat to Air Hitam. The defendant testified that when he first saw the motorcycle it was about 100 metres away and that when it came within 30 to 40 feet from him it crossed over to his lane, that he swerved to his right thinking he was able to avoid the collision but he was not successful. He said that the front left hand side of his motorcar came into contact with the motorcycle. He confirmed the photographs which showed the damage to his motorcar namely broken front and rear windscreen, left head light and signal. The defendant added that he collided into the rear left hand side of the motorcycle. In cross-examination he said that the motorcycle was in the middle of the road on the centre white line. He admitted to travelling then at 40 m.p.h. and to being one foot from the centre white line when the plaintiff allegedly encroached into his path. The defendant marked the sketch plan with a cross indicating where his motorcar was at the time when the plaintiff encroached into his path. The defendant made his police report about 2½ hours after the accident. If he intended to concoct his story as to how the accident happened he would not have had much time to do so. I do not think he intended so to do. I believe his police report is a statement of truth. In it he said:

> I on my way from Johor Bahru was driving motorcar No. WQ 424 proceeding towards direction of Jasin Melaka. On reaching the

> $13^{1}/_{4}$ milestone Parit Raja i.e. at 9.00 p.m. 5 July 1984, a motorcycle was seen in motion in the centre of the road and was seen to enter my lane. In that situation I then swerved my car towards the right to avoid the collision but unfortunately the motorcycle collided into the rear side of the car, I drove my car, my car landed on the right side of the road. My car was damaged at the rear side, rear lamp, rear tyre, front signal light. Bumper was also damaged. The estimated damages is not known yet.

The defendant's wife was seated beside him nursing her baby at the time of the accident. She said that they had been travelling from Johor Bahru intending to go to Jasin. I accepted her as a witness of truth. As to the direction in which the two vehicles were travelling I accepted the statement of the plaintiff and defendant in their respective police reports. Based on all this evidence I have no hesitation in finding that at the time of accident the vehicles were travelling in a direction opposite to each other.

The third witness called on behalf of the defendant was Dr. Balasundram who testified that he saw the plaintiff the day after the accident when he found him to be a little restless but rational and fully conscious. That was at 9.30 a.m. Corporal Ismail also testified saying that he took the plaintiff's police report at the hospital on 7 May 1984, that is to say two days after the accident. On the evidence of the doctor and the Corporal, again I have no hesitation finding that the plaintiff knew exactly what he was saying in his police report and it will be recalled that in that report he said that he did not know what happened to him when he reached the $13^{1}/_{4}$ milestone and this supports my finding that the plaintiff's evidence did not serve his cause.

The police sketch plan, with the aid of the key, showed the road to have an overall width of 20 feet 5 inches, the defendant enjoying a right of way 10 feet five inches in width, the plaintiff's right of way being 9 feet 10 inches wide, the plaintiff's motorcycle lying facing a northerly direction on the side table on his wrong side of the road and the defendant's motorcar likewise on the defendant's wrong side of the road, partly on the grass verge and partly on the road facing a north-easterly direction. The sketch plan also showed broken glass scattered on the defendant's correct side of the road between the left verge and the centre white line, but there were no measurements to indicate where exactly the broken glass was scattered *vis-a-vis* the edge and the white line.

If there was any broken glass coming from the motorcycle there would have been comparatively little. The defendant's statement in his police report, his evidence and the photographs all pointed to the broken glass coming from the motorcar. In the event this indication of the broken glass puts the lie on the pillion rider's evidence that before the accident the motorcycle was travelling 2 - 3 feet from the plaintiff's left edge of the road.

At the end of the defendants' case, plaintiff's Counsel applied for leave to amend the statement of claim. Counsel for the defence objected saying that the application came far too late in the proceedings and would have the effect of taking away the whole sub stratum of the plaintiff's case and substituting a new one. A number of authorities were cited by both sides. In the end I allowed the plaintiff to amend his pleading. I did so because it was considered unfair that the plaintiff may be shut out of a legitimate claim based on a pleading technicality. The statement of claim was amended but all the plaintiff said by way of amendment was that he recalled seeing the lights of an oncoming motorcar and he recalled further being collided into from the rear. In regard to the particulars of negligence the plaintiff pleaded by way of amendment that the defendant was driving too close to the centre white line and collided into the motorcycle and deleted his allegation that the defendant was following too close to the rear of the motorcycle and driving too close to the edge of the road. I did not consider the defendant was in any way prejudiced or embarrassed by the amendment. In any event I considered the amendments well within the plaintiff's original pleadings inasmuch as the plaintiff never specifically pleaded that the defendant was travelling in the same direction as the plaintiff but only by way of particulars stated that the defendant was following too close to the rear of the motorcycle. As to the original pleading that the defendant was driving too close to the edge of the road, I had in mind that the defendant did not seek further and better particulars as to which edge of the road the plaintiff was referring to.

In any event, in the end it is largely on the defendant's own pleaded facts and evidence that this case has been decided and therefore any complaint about the plaintiff's pleadings original or amended or my having allowed amendment can have no foundation.

It is stated in r. 13 of the Highway Code that vehicles should at all times be driven on the lefthand side of the road. Thus the plaintiff should have been riding his motorcycle as close as possible to his left edge of the road. Similarly the defendant should have been driving his motorcar as close as reasonably possible to his left edge of the road. If each of the parties had been doing this they would have crossed each other safely and there would have been no accident.

However it is clear from the evidence that the plaintiff and the defendants were not proceeding in a safe manner as abovestated. On the evidence I find that the plaintiff was riding his motorcycle on the centre white line and the defendant was driving his motorcar only one foot from that line on his side of the road. Thus both the plaintiff and the defendant had placed themselves in a position of potential danger allowing a width of only one foot when crossing each other. They each proceeded in this dangerous way along the road, a road which was wide enough for each vehicle to pass the other safely because according to the agreed police sketch plan the road was more than 20 feet wide and according to the evidence of the defendant, which I accept, his motorcar was a Honda Civic and about 5 feet wide. In the dangerous and negligent situation which both parties had themselves created, the plaintiff then did a second dangerous and negligent act. Instead of swerving to his left to avoid the motorcar he turned to the right. According to the evidence of the defendant as abovestated when he saw the oncoming motorcycle, the motorcycle was 100 metres away in the middle of the road on the centre white line. Notwithstanding this situation the defendant proceeded, allowing a width of only 1 foot between his car and the white line. At that time he admitted he was travelling at 40 m.p.h. There is no evidence that he reduced his speed. Again, according to the evidence of the defendant, when the motorcycle was 30 or 40 feet away it crossed into his lane and he the defendant swerved to his right to avoid the collision. A vehicle travelling at 40 m.p.h. covers a distance of 58.66 feet in one second. When the motorcycle turned to the right, the defendant had to think what to do. It took time to think. In **Bingham's Motors claims cases**, 9th edition, p. 121 it is stated that the English Highway Code gives a thinking distance of 40 feet for a vehicle travelling at 40 m.p.h. Thus in this case the probability is that the collision took place before the defendant was able to complete his thought process and take any action to turn to the right. The defendant marked on the sketch plan with a cross the point of impact. That was the point of collision according to him. It was very close to the white line. According to the defendant the front left hand side of his car collided into the rear left hand side of the motorcycle. It had to follow from the defendant's own evidence that the defendant's motorcar also was in the middle of the road, probably proceeding astride the dividing white line. Two further points, it seems to me, support that view. Firstly the defendant was asked in cross examination as follows:

> Q. If the plaintiff was travelling in the middle of the road for a distance of 100 meters why did you not swerve to the left when there a is 15 feet side table.

To that question the defendant answered:

> A. They were travelling to their right. Although the side table is wide I refused to use the side table just to avoid a head on collision.

The defendant's answer abovestated clearly indicated his attitude and state of mind at the material time. It seemed to me that the defendant drove his motorcar without caring about the oncoming motorcycle, expecting the motorcycle to get out of his way. Secondly if the motorcar was proceeding on its correct side of the road it is hardly likely that the plaintiff when only 30 or 40 feet away would have crossed into the path of the motorcar. It is more probable, and I find so, that the defendant was driving the motorcar in the middle of the road astride the dividing line refusing or neglecting to give way and expecting the motorcycle to do so and that the plaintiff on his part was of the same mind and bore the same attitude,

expecting the defendant to move over - until the danger built up and they were 30 or 40 feet apart. Faced with their self created emergency the plaintiff decided to swerve to the right and in the event the left front of the car collided into the left rear of the motorcycle and then the defendant went over to the other side of the road.

In *Goh Beng Seng v. Dol Bin Dolah* [1970] 2 MLJ 95, Sharma J. said at p. 97:

> There can be no territorial or geometrical division of the road. The centre line remains a guide and a reminder only. One's duty is to ensure safety for oneself and for others. The attitude of mind that because the driver coming from the opposite direction is encroaching a few inches of my side of the road, I can treat him as a trespasser and proceed on my half of the road as if it was my exclusive domain and that I am totally immune from liability if I drive within the exact limits of that "realm" even though I know that an accident may thereby happen on my side of the road, is the attitude of an irresponsible and an irrational being. I owe a duty to others on the road just as others owe a duty to me.

This *dictum* of Sharma J. was followed by L.C. Vohrah J. in *Kasirin bin Kasmani v. The Official Administrator & Anor*. [1991] 3 CLJ 2498 and likewise I respectfully accept it.

Accordingly I find the plaintiff and the defendant equally liable in negligence for the accident.

CHE WAN DEVELOPMENT SDN. BHD

v.

CO-OPERATIVE CENTRAL BANK BHD.

HIGH COURT, KUALA LUMPUR
DATO' N.H. CHAN J.
[ORIGINATING SUMMONS
NO. S5-31-3640-88]
19 FEBRUARY 1993

PRACTICE & PROCEDURE: Taxed costs - Paid by defendant to plaintiff - Receivers of defendant requesting repayment of moneys paid - Plaintiff making application to amend order - Whether application necessary - Whether receivers entitled to repayment.

The plaintiff brought an action against the defendant which culminated in judgment for the plaintiff with costs. During the course of the action the defendant was placed under receivership and the receivers took over conduct of the case on behalf of the defendant. The costs were in fact paid by the receivers but they subsequently requested the plaintiff to return the money.

The plaintiff applied to amend the order for costs so as "to reflect the true intention of the Court" that it was the receivers who were to pay the costs.

Held:

[1] The rule is that the costs of unsuccessful litigation incurred by a liquidator are payable to the party entitled out of the assets of the company in priority to the costs of the liquidation and the rule applies even though the order simply directs payment of costs.

[2] The full taxed costs of the unsuccessful litigation by the receivers have been paid to the party entitled, which is the plaintiff and they cannot be repaid.

[3] The receivers are entitled by regulation 13(1) of the Essential (Protection of Depositors) Regulations 1986 to recoup themselves out of the assets of the defendant in priority to all other claims.

[Order accordingly. Costs to the plaintiff].

Cases referred to:

In re Pacific Coast Syndicate Ltd [1913] 2 Ch 26 ***(refd)***
In re Home Investment Society [1880] 14 Ch D 167 ***(foll)***
In re London Metallurgical Company [1895] 1 Ch 758 ***(foll)***